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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CITY OF BOERNE, Texas,
Petitioner,

VS.

P. F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,

and

UNITED STATES OF AMERICA,
Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICI CURIAE TEXAS MUNICIPAL LEAGUE AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER CITY OF BOERNE, TEXAS

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INTEREST OF AMICI CURIAE

The Texas Municipal League is a non-profit association of over 1,000 Texas municipalities. Over 13,000 mayors, councilmembers, city managers, city attorneys, and department heads are member officials of the League by virtue of their cities' participation. The TML Legal Defense Program was established to monitor major litigation that affects municipalities and to file briefs on behalf of cities in cases of special significance to municipalities.

The International Municipal Lawyers Association is a non-profit, nonpartisan organization, consisting of over 1,400 local governments and their attorneys. Member governments operate IMLA through their chief legal officers, variously called city or county attorneys, corporation counsel, city solicitors, law directors, and other titles. IMLA is dedicated to gathering and disseminating information on recent legal developments that affect municipalities. IMLA participates in a case in an *amicus* capacity when a majority of the Board of Directors determine that the case has nationwide impact and *amicus* support is warranted.

Amici Curiae the Texas Municipal League and the International Municipal Lawyers Association urge the Court to grant certiorari in this case to address a federal question of vital importance to cities and towns throughout this country.

Pursuant to the Rules of this Court, the parties have consented in writing to the filing of this *amicus curiae* brief.

At issue in this case is the constitutionality of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb *et. seq.* This act is an unprecedented attempt to modify the relationship between Congress and the Supreme Court in matters of their respective roles in enactment and interpretation of federal law. RFRA has imposed a new burden on municipal officials in that it applies a judicial standard that has never been required by the Supreme Court to all regulatory practices of state and local government. In RFRA, Congress has ordered state and local governments to accommodate every conceivable religious practice by a universal "least restrictive means" test. Cities enact and enforce a myriad of regulations that may include building codes, zoning laws, sexually oriented business standards, street and traffic regulations, health and safety ordinances, and many other types of rules and requirements. Congress has attempted, by the enactment of RFRA, to pass a universal statute imposing a rule for determining the constitutional validity of every local act and practice. Any complaint by churches, religious groups, or individuals claiming religious motivation is now subject to a new, extraordinarily high and burdensome federal standard that significantly restricts local autonomy.

Amici Curiae respectfully submit this brief in support of the Petitioner, the City of Boerne, Texas.

REASONS FOR GRANTING THE WRIT

A. The Validity of RFRA Raises A Federal Question of Vital Importance to Local Governments

The legislative history of the Religious Freedom Restoration Act reflects a clear congressional intent to ratchet up constitutional law under the First Amendment's Free Exercise Clause. *Employment Division v. Smith*, 494 U.S. 872 (1990), found that neutral, nondiscriminatory, local laws of general applicability which had an impact upon religious practice were not invalid under the Free Exercise Clause if there was a rational relationship to a legitimate state interest.

Under the Supreme Court's pre-Smith decisions in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the Court announced broad protection for religiously motivated practices in the face of attempted governmental regulation, the lower courts struggled to strike the appropriate balance for claims of religious freedom in the context of general regulations. The analysis under *Sherbert* and *Yoder* established a two-part inquiry: first, the plaintiff had to establish that the

challenged government action imposed a significant burden on the free exercise of religion; second, if a burden was established, the government would then have to justify the imposition of that burden with a compelling state interest.

The court in *Smith* applied a broad principle that, for the most part, upheld the applicability of general, neutral regulations by abandoning the "compelling interest standard" and emphasized that "[t]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith* at 879 (quoting from *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring). The Court concluded that general laws would be upheld against free exercise claims so long as they revealed a "rational relationship" to a legitimate state interest.

In 1993, Congress expressed its strong dissatisfaction with the Supreme Court's interpretation and as a direct result of the *Smith* opinion, it passed the Religious Freedom Restoration Act, 42 U.S.C. 2000bb. Congressional motive in passing RFRA emphasized the legislative intent to institute, in statutory form, the infrequently used "compelling interest" test. The *Smith* court recognized that the "compelling interest" test was not utilized in free exercise cases beyond unemployment compensation cases. It is this standard,

however, that Congress mandated must be used in all instances.

RFRA creates considerable uncertainty, confusion, and liability for local officials. The burden has shifted to the government to justify its neutral and nondiscriminatory ordinances and actions with a compelling interest and to demonstrate that it does so by the least restrictive means. Municipalities are being compelled by a federal policy decision to accommodate religion beyond what is required in the Constitution. The effect upon cities is enormous because cities regulate in complex areas such as land use, health and safety, and many others that affect the daily activities of people and organizations. Expensive and time-consuming litigation resulting from claims under RFRA has been and will be borne by the cities who are already struggling to provide adequate levels of service and protection for their citizens.

In analyzing RFRA one commentator suggested:

> "If Congress has improved on the level of protection, it may in effect rob the examining courts of review of the constitutional issue. For instance, if a freedom of religion case were decided today, the lower court likely would not even need to reach the constitutional free exercise issue, because it

> could decide the case solely under RFRA. As freedom of religion cases start to swirl around RFRA's fixed aspect, the cases will become instances of interpretation of legislative intentions regarding liberty rather than interpretation of the Constitution itself."

Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L.Rev. 357 (1994).

The tendency toward this approach is evident in *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F.Supp. 538 (D.D.C. 1994), where a federal district court granted summary judgment to the plaintiffs and enjoined the application of the District of Columbia's zoning ordinance to a soup kitchen operated out of a church building. In this case, the church received a building permit for a new church; no reference was made in the application to the fact that the church planned to operate a feeding program for the homeless at the site. When the local neighborhood group learned of the church's plans, they informed the zoning officials. The zoning administrator then informed the church that they would need a variance on their permit to operate the feeding program. The church appealed the decision to the Zoning Board of Appeals, where relief was denied. The church later filed suit under the First Amendment and RFRA.

Although the court found that there was a violation of the First Amendment and RFRA, the opinion only discussed RFRA and the reasons for its enactment. The Court concluded in the decision that:

> "Once the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct. Zoning boards have no role to play in telling a religious organization how it may practice its religion. A city cannot use its zoning laws to regulate the way a particular religion offers its prayers or the way a religion celebrates its holidays." (Emphasis added.) *Id.* at 546.

Does this mean that once a church secures a building permit, it is then exempt from all land use and zoning requirements? Is the church exempt from requirements that city officials do not know are applicable when the building permit is issued? RFRA severely skews the Constitution's federalist balance between the states and the federal government, and violates the fundamental constitutional principle that divides power between the states and the federal government.

B. The Decision of the Fifth Court Upholding RFRA Conflicts with this Court's Federalism Doctrine

Congress has enacted legislation for many worthy programs to achieve notable goals, many of which may be shared by local officials, however its method of implementing some of these programs distorts the concept of federalism and infringes upon the Constitution's Tenth Amendment reservation of powers to the states and their political subdivisions. This Court, in recent years, has written on the principle of constitutional federalism and of the limitations on the federal government as stated in the Tenth Amendment. See, e.g., *Seminole Tribe of Fla. v. Florida*, 116 S.Ct. 1114 (1996); *United States v. Lopez*, 115 S.Ct. 1624 (1995); *New York v. United States*, 505 U.S. 144 (1992); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

As this Court wrote in *New York* as follows:

> Much of the Constitution is concerned with setting forth the form of our government and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such

> measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crises of the day. . .(T)he Constitution has never been understood to confer upon Congress the ability to require the states to govern according to Congress' instructions. *New York*, 505 U.S. at 187 and 162.

With RFRA, Congress has "instructed" states and local governments to review all legislative actions and activities - past, present, and future - for potential religious impact according to a specific standard that goes beyond what the Constitution itself requires. The burden is now on cities to assess whether a general regulation will have a substantial impact on any religious activity or organization. Cities must investigate and determine the least restrictive means for applying neutral and nondiscriminatory regulations - and they must do this, if they can, without violating the Establishment Clause or engaging in excessive entanglement. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). This process is mandatory because if a violation is found to occur, serious financial implications will result under 42 U.S.C. §§ 1983 and 1988. This new legislative prerequisite is being attached to every

form of local lawmaking, even areas traditionally left to state determination, like zoning or local land use issues. These requirements go well beyond the permissive limits of federalism.

CONCLUSION

For the foregoing reasons, the Amici Curiae respectfully request the Court to grant the petition for certiorari.

Respectfully submitted,

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